Tentative Rulings for January 16, 2013
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

11CECG02499 ***City of Fresno v. Kirkland*** **(Dept. 501)**

12CECG02274 ***Ormond v. Whelan*** **(Dept. 503)**

12CECG03144 ***Jones v. Nickerson*** **(Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

10CECG00908 ***The Diocese of San Joaquin v. Snell, et al.*** **is continued to Wednesday, January 30, 2013, at 3:30 p.m. in Dept. 403.**

10CECG00434 ***CA-Centerside II v. Franchise Tax Board*** **Is continued to Thursday, February 28, 2013 at 3:30 p.m. in Dept. 501.**

11CECG04030 ***Aguayo v. Cal. St. University Fresno Assn., Inc.*** **is continued to Thursday, January 17, 2013, at 3:30 p.m. in Dept. 501.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

03

Tentative Ruling

Re: ***Braga v. Martinez***
Case No. 12CECG03477

Hearing Date: January 16th, 2013 (Dept. 402)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant the order approving the petition to compromise the minor's claim. (Probate Code § 3500 *et seq*., Cal. Code of Civ. Pro. § 372 *et seq*.) However, petitioner has not submitted a proposed order. Petitioner's counsel needs to submit an order to the court for signature. No appearances by the petitioner or the minor are necessary.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/15/13.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***State Center Community College District v. American Property Holdings et al.***
Superior Court Case No. 10CECG03871

Hearing Date: January 16, 2013 (**Dept. 402)**

Motion: By Plaintiffs for Summary Judgment or in the alternative, summary adjudication

Tentative Ruling:

To continue the hearing to **April 4, 2013** at 3:30 p.m. in Dept. 402 to be heard in conjunction with the Defendants' proposed motion for summary judgment, or in the alternative, summary adjudication. The time constraints set forth in CCP § 437c will control all filings for the Defendants' motion.

As for the Plaintiff's motion, given that the Plaintiff filed an amended Separate Statement on January 8, 2013, the Defendants will be permitted to file an amended opposition, if necessary, within the time constraints set forth in CCP § 437c(b)(2) governed by the **new** hearing date. The Plaintiff will be permitted to file a reply within the time constraints set forth in CCP § 437c (b)(4) governed by the **new** hearing date.

Pursuant to California Rules of Court, Rule 3.1312(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/15/13.
(Judge's initials) (Date)

Tentative Ruling

(24)

Re: ***Samantha Lombardi v. Sequoia Safety Council***
Court Case No. 12CECG02706

Hearing Date: **January 16, 2013 (Dept. 402)**

Motion: 1) Defendant's Demurrer to Complaint
2) Defendant's Motion to Strike Portions of the Complaint

Tentative Ruling:

To sustain the defendant's demurrer to the complaint with leave to amend.

To deny in part and to grant in part the motion to strike. The motion to strike the third sentence of Paragraph 30 is denied. The motion to strike Paragraph 37 and the prayer for punitive damages (Paragraph 7 of the prayer) is granted, with leave to amend.

Plaintiff is granted 10 days' leave to amend. The time in which the complaint can be amended will run from service by the clerk of the minute order. New allegations/language in the first amended complaint are to be set in **boldface** type.

Explanation:

Demurrer

First cause of action:

The fact that the First cause of action combines two separate legal theories does not automatically subject it to demurrer, since if a cause of action states a claim for *any* relief, it will be held as good against general demurrer (i.e., a demurrer under CCP §430.10(e). [Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 123] However, this practice might be found to create uncertainty, when a simple separation of these causes of action into two separate counts would alleviate this. In this case, the court so finds.

As for the accommodation claim, plaintiff's allegation at ¶11 does not constitute a "request for accommodation" as anticipated under the guidelines, but rather is a request that she be allowed to return to work. In *Brundage v. Hahn* (1997) 57 Cal.App.4th 228 the court found that plaintiff's request for reinstatement was not an accommodation: "She does not seek 'accommodations that [would] enable [her] to perform the essential functions of the position held or desired'; instead, she wants her position back. This is simply not a 'reasonable accommodation' under the ADA." [*Id.* at 240]

Furthermore, even if it is considered an accommodation, plaintiff has also alleged that defendant agreed to this accommodation. [Complaint at p.4:8-9] Thus, plaintiff has failed to sufficiently allege a cause of action for failure to accommodate.

As to the discrimination claim plaintiff attempts to state in the First cause of action, neither side's argument really addresses this, but instead each party focuses on the claim for failure to make a reasonable accommodation. However, the court finds that the discrimination claim is also deficient because plaintiff has not alleged a circumstance suggesting a discriminatory motive. [*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 355 [100 Cal.Rptr.2d 352, 8 P.3d 1089]

Therefore, the demurrer to the First cause of action is sustained with leave to amend based on failure to state facts sufficient to constitute a cause of action. [CCP §430.10(e)] Moreover, the combining of two separate claims into one cause of action creates uncertainty. [CCP §430.10(f)] If plaintiff amends, she is directed to split these claims into separate causes of action.

Second cause of action:

As with the First cause of action, plaintiff fails to allege that she requested any reasonable accommodation, and thus defendant cannot be liable for failing to engage in the interactive process. The employee must initiate the process. [*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 983-984]

The demurrer to the Second cause of action Is sustained with leave to amend based on failure to state facts sufficient to constitute a cause of action. [CCP §430.10(e)]

Third cause of action:

Plaintiff fails to adequately allege that defendant had a discriminatory motive in terminating plaintiff. Essentially, plaintiff makes two allegations: 1) that male employees were allowed to return to work after suffering injuries; and 2) that defendant had a policy of always assigning at least one male to an ambulance, and would never assign two or more females to work in one ambulance.

The first allegation is inadequate. As already noted, according to plaintiff's own allegation, plaintiff was being allowed to return to work after suffering injuries, but on the condition that she have a physical and a drug test. Therefore, this statement in and of itself does not adequately show a discriminatory animus. By way of example, if plaintiff had alleged that male employees were allowed to return to work after injury without being required to have a physical and take a drug test, even though plaintiff was required to do so, this might suggest that defendant made this additional requirement based on her gender. Or, if plaintiff alleged that male employees were always allowed to return to work after injury, but females routinely were not, that would suggest a discriminatory animus. But the simple statement that male employees were allowed to return to work after injury is not sufficient to indicate a circumstance suggesting a discriminatory motive. [*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 355 [100 Cal.Rptr.2d 352, 8 P.3d 1089]

The second example (the employer's assignment of personnel to the ambulances) is also inadequate, since there is no apparent nexus between the alleged discrimination plaintiff suffered, and the alleged discriminatory policy in assigning personnel to ambulances.

The demurrer to the Third cause of action is sustained with leave to amend based on failure to state facts sufficient to constitute a cause of action. [CCP §430.10(e).

Motion to Strike

As for the request to strike Paragraph 30, it must be noted that there is confusion created by several discrepancies as to what defendant is asking for. In some places the memorandum defendant asks that the whole of paragraph 30 be stricken, and in other places that just the third sentence (about the assignment policy) be stricken. Then in the prayer the memo erroneously states that it is asking for paragraph 29 to be stricken. However, Defendant's argument actually deals only with the third sentence of paragraph 30, arguing that it is irrelevant to plaintiff's claim for gender discrimination. Therefore, the court has taken the motion to be asking only that this sentence be stricken.

However, as indicated above, the court has already dealt with this allegation in the demurrer, and has indicated that if plaintiff is going to allege this she must show the nexus between it and her claim that it shows discriminatory animus prompting defendant to fire her. Therefore, the request to strike this sentence is mooted by the ruling on demurrer, and is thus denied.

As for the request to strike the claim for punitive damages, consisting of a request so strike Paragraph 37 and the prayer for punitive damages (paragraph 7 of the prayer), the court will grant the motion to strike, with leave to amend. Even though this paragraph contains the standard "boilerplate" allegations supporting a request for punitive damages, plaintiff has also alleged that defendant's General Manager, Dave Byl, "falsely stated" that plaintiff had failed her drug test and falsely claimed she had admitted to marijuana use (See Complaint, p.4:17-19). This *might* support the allegations made in paragraph 37, if Mr. Byle made these statements *knowing they were false*, or that he *should have known* they were false. The allegations as currently stated fail to go that far, however, and as now constituted this might just as easily be alleging that Mr. Byl mistakenly believed this information (for instance, having been given erroneous information) and that he made the statement in the letter out of a business duty and in good faith that the statements were true. Defendant is entitled to know if plaintiff is accusing it of a deliberate lie or not.

Thus, the request to strike paragraph 37 and the prayer for damages is granted. However, plaintiff is given leave to maintain paragraph 37 and amend paragraph 12 if she has a reasonable basis to allege that Mr. Byl made this statement knowing it was false, or if she can add some other facts to paragraph 12 to support a request for punitive damages. Plaintiff is also given leave to amend to add any language to paragraph 37 that she deems necessary to complete her allegations.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/15/13.
(Judge's initials) (Date)

Tentative Rulings for Department 403

(6)

Tentative Ruling

Re: ***Kaweah Container, Inc. v. Jet Plastica Industries, Inc.***
Superior Court Case No.: 12CECG01081

Hearing Date: January 16, 2013 (**Dept. 403**)

Motion: By Defendant/Cross Defendant MCG Capital Corporation to lift discovery stay in place under Code of Civil Procedure §425.16, subdivision (g)

Tentative Ruling:

To grant, ordering that the discovery stay in place pending the anti-SLAPP motion set for hearing on March 13, 2013, be lifted as to all discovery proceedings in the action.

Explanation:

MCG Capital Corporation has shown "good cause" that all discovery proceedings be conducted notwithstanding Code of Civil Procedure section 425.16, subdivision (g), because it is the target cross-complainant of the anti-SLAPP motion (*Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1126), the moving party on the anti-SLAPP motion has agreed the stay should be lifted, and no other parties have opposed this motion to lift the discovery stay.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 1/15/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 501

(6)

Tentative Ruling

Re: ***Pevyhouse v. The California Highway Patrol***
Superior Court Case No.: 12CECG00989

Hearing Date: January 16, 2013 (**Dept. 501**)

Motion: By Plaintiff Larry Pevyhouse to compel Defendant California Highway Patrol's further responses to form interrogatories (set two) and for monetary sanctions

Tentative Ruling:

To grant, with Defendant's further responses to be served within 10 days after service of this minute order, and to grant Plaintiff's request for monetary sanctions against Defendant The California Highway Patrol in the amount of $1,410.00, payable to Plaintiff's attorney within 30 days after service of this minute order. *Should hearing be requested by either side, the sanction order may increase, decrease or remain the same based upon the persuasiveness of the requesting party's oral arguments*.

Despite its tardiness, the Court has considered Defendant's opposition.

The Court also notes that this motion was filed prior to the effective date of The Superior Court of California, Local Rules, rule 2.1.17, and was therefore exempt from compliance. Any future motions under sections 2016.010 through 2036.050, inclusive, of the California Code of Civil Procedure, except for motions to compel initial responses to interrogatories, requests for production and requests for admissions, will not be heard without prior compliance with rule 2.1.17.

Explanation:

Defendant The California Highway Patrol's ("Defendant") objections to form interrogatory #15.1 are overruled, and it is ordered to serve a further response.

Defendant did not justify the challenged objections or answer the interrogatory. (*Coy v. Superior Court* (1962) 58 Cal.2d 210, 220-221.) It appears the terms Defendant is misconstruing are defined by statute. (Code Civ. Proc., §§431.10, subd. (a).) Plaintiff Larry Pevyhouse ("Plaintiff") is entitled to discovery of facts supporting Defendant's affirmative defenses. (Code Civ. Proc., §§ 2030.220, 2030.240; *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783; see also Code Civ. Proc., § 2017.010.) Objections concerning "burden" will be sustained only where the work required to respond to the interrogatory is so great, and the utility of the information so minimal, that the discovery is unjust. (*Columbia Broadcasting System, Inc.* (1968) 263 Cal.App.2d 12, 19.) The party resisting the discovery on this basis bears the burden of showing the burden is so unjust it

amounts to oppression. (*West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, 418.) The discovery is not premature because a plaintiff may propound discovery at any time 10 days after service of the summons on the defendant or an appearance (Code Civ. Proc., §2030.020. subd. (b)), which here was April 16, 2012, and the discovery was propounded on August 13, 2012. A party responding to interrogatories cannot simply respond by saying it is unable to respond. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 406.) Statute specifically provides that: "Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, electronically stored information, tangible thing, or land or other property." (Code Civ. Proc., § 2017.010.)

Defendant complains that Plaintiff did not meet and confer, citing a local rule that does not exist. (The Superior Court of Fresno County, Local Rules, rule 1.14, as cited by Defendant, page 2:4-7.) If Defendant is referring to local rule 1.1.4, for the definition of "meet and confer," Defendant appears to ignore the fact that Plaintiff's attorney, John Fowler, says he spoke to attorney Michelle Littlewood by telephone on September 25, 2012, about the discovery responses, and says that Ms. Littlewood agreed to consider the matter by the end of the week, e.g., on or before September 28, 2012. Plaintiff's "meet and confer" efforts were adequate.

Ms. Littlewood's declaration inadequately addresses her failure to respond to Mr. Fowler's telephone call last September, as promised. Even if Defendant has since served a supplemental response, Plaintiff is entitled to be compensated for the cost of having to bring the present motion to compel. (Cal. Rules of Court, rule 3.1348.) Ms. Littlewood's declaration also does not address why, if she received electronic notification about today's hearing date on January 2, 2013, she did not file opposition until January 14, 2013.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 1/15/2013.
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Lucas v. KTDA Group Homes, Inc. et al.***

Superior Court Case No. 11CECG02159

Hearing Date: January 16, 2012 (Dept. 501)

Motion: Plaintiff's Motion for Protective Order

Tentative Ruling:

To deny. To deny sanctions.

Explanation:

The Discovery Act permits a party to object to particular discovery requests as unduly burdensome or oppressive and allows them to seek a protective order. Code of Civil Procedure section 2025.420 provides that the court, "for good cause shown, may make any order that justice requires to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (Code Civ. Proc. § 2025.420, subd. (b).) The protective order may require that deposition(s) not be taken at all, that they be rescheduled, or that they be taken on certain terms and conditions. (Code Civ. Proc. § 2025.420, subd., (b)(1), (2), (5).) "If the motion for a protective order is denied in whole or in part, the court may order that the party provide or permit the discovery against which protection was sought on those terms and conditions that are just." (Code Civ. Proc. § 2030.090, subd. (c).)

The burden is on the party seeking the protective order to show good cause for whatever order is sought. (*Goodman v. Citizens Life & Cas. Ins. Co*. (1967) 253 Cal.App.2d 807, 819.) Unavailability of counsel may be good cause for a protective order, but protracted unavailability may not be used as an excuse to dictate the pace and flow of discovery.

Counsel, Larry H. Shapazian and Joseph D. Cooper, Sr. are each ordered to appear. They are directed to call this department by 4:00 p.m. the day before this hearing to confirm their personal appearance by telephone or in person. At the hearing, counsel will inform the court whether they have reached a mutually agreeable arrangement for the depositions of Mr. McCall and Mr. Gonzales. If no agreement has been reached, the court will schedule the depositions. Weekends and holidays will not necessarily be excluded.

Sanctions are denied.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 1/15/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 502

(6)

Tentative Ruling

Re: ***Gonzales v. Martin***
Superior Court Case No.: 12CECG01737

Hearing Date: January 16, 2013 (**Dept. 502**)

Motion: By Plaintiff Nasaria Gonzales for trial preference

Tentative Ruling:

To grant, with trial in this matter to be re-set for May 13, 2013, and the current trial date of January 13, 2004, vacated, with the clerk's office to set all the remaining trial-related dates to coincide with the new trial date.

Explanation:

The court finds that Plaintiff Nasaria Gonzales has a substantial interest in the action as a whole, and that her health is such that a preference is necessary to prevent prejudicing her interest in the litigation. (Code Civ. Proc., § 36, subd. (a).) The declaration of attorney Brian Cuttone meets the requirements of Code of Civil Procedure section 36.5.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1/14/13.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Galaviz, III v. Parlier Unified School District et al.***
Superior Court Case No. 10CECG03670

Hearing Date: **January 16, 2013 (Dept. 502)**

Motion: Defendants' Motions for Terminating Sanctions

Tentative Ruling:

To grant the motion and impose terminating sanctions pursuant to Code Civ. Proc. § 2023.010(d) and (g) for failure to respond or to submit to an authorized method of discovery and disobeying court orders to provide discovery. Pursuant to Code Civ. Proc. § 2023.030(d)(3) the action will be dismissed.

Explanation:

On 9/5/12 both defendants, separately, moved to compel initial responses to discovery. Parlier sought responses to Form Interrogatories, Set One, Special Interrogatories, Set One, and Request for Production of Documents, Set One, all served on 3/7/12. Flores sought responses to Form Interrogatories, Set One, and Request for Production of Documents, Set One, served on 6/25/12.

The motions were granted, with plaintiff ordered to serve responses within 20 days. Monetary sanctions were imposed in the amount of $415 in favor of Parlier and $500 for Flores.

Because plaintiff still failed to provide any discovery responses, defendants moved for terminating sanctions on 12/12/12. The court continued the motion to 1/16/13 in order to give plaintiff one last and final opportunity to respond to the discovery. Plaintiff still has not responded.

"A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction." *Mileikowsky v. Tenet Healthsystems* (2005) 128 Cal.App.4th 262, 279-280.

Here, the discovery has been outstanding for over nine months. The amount of discovery expected is reasonable – your standard discovery requests. The importance of the desired discovery is high. Since plaintiff continually fails to provide the discovery or obey court orders to do so, and is not even opposing this motion for terminating sanctions, there appears to be little likelihood that any compliance with the discovery rules or the court's orders will be forthcoming. The motion will be granted. See *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1244.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1/14/13.
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Paulsen v. Mennonite Brethren Homes, Inc.***
Case No. 12CECG02786

Hearing Date: January 16th, 2013 (Dept. 502)

Motion: Defendant's Petition to Compel Arbitration and Stay the Action

Tentative Ruling:

To deny the petition to compel arbitration, and the request to stay the pending court proceedings. (CCP § 1281.2.)

Explanation:

First of all, defendant has the burden of showing the existence of a valid, enforceable agreement to arbitrate. (*Pagarigan v. Libby Care Center, Inc.* (2002) 99 Cal.App.4th 298, 301.) Here, defendant presents copies of two purported arbitration agreements, one of which deals with medical malpractice claims, and the other which purports to waive decedent's right to a jury trial and go to arbitration on all other claims against defendant. (Exhibits A and B to Petition.) However, neither agreement is signed by decedent. Instead, they are signed by decedent's husband, James Paulsen, allegedly as decedent's "legal representative." (*Ibid*.) Yet defendant offers no evidence that James Paulsen actually had the authority to sign the agreements on behalf of decedent or waive her constitutional right to a jury trial.

In *Pagarigian v. Libby Care Center, supra*, 99 Cal.App.4th 298, the Court of Appeal held that that the defendant nursing home had not met its burden of showing the existence of a valid agreement to arbitrate where the agreement was signed by the resident's daughters, and there was no durable power of attorney or other evidence that the daughters were authorized to sign on behalf of their mother. (*Id*. at 301.) The court also rejected the defendants' argument that the daughters themselves represented that they had the authority to bind their mother to the agreements, finding that this was "totally irrelevant." (*Ibid*.)

"A person cannot become the agent of another merely by representing herself as such. To be an agent she must actually be so employed by the principal or 'the principal intentionally, or by want of ordinary care, [has caused] a third person to believe another to be his agent who is not really employed by him.' Defendants produced no evidence Ms. Pagarigan had ever employed either of her daughters as her agent in any capacity. Nor did defendants produce any evidence this comatose and mentally incompetent woman did anything which caused them to believe either of her daughters was authorized to act as her agent in any capacity." (*Id*. at 301-02.)

In addition, the court found that the daughters did not have legal authority to bind their mother to arbitration simply because they were her next of kin. (*Id*. at 302.) Although a person's next of kin may have the legal authority to make medical decisions on behalf of the patient, this does not mean they also have the authority to bind the patient to arbitration. (*Ibid*.)

Also, in *Golinger v. AMS Properties, Inc*. (2004) 123 Cal.App.4th 374, the Court of Appeal found that the defendant had not met its burden of showing that the daughter of a resident had the legal authority to bind her mother to arbitration of disputes with the facility, even though there was evidence that the daughter had the authority to act for her in medical matters. (*Id*. at 376-377.)

Likewise, here defendant has not presented any evidence that James Paulsen had the legal authority to bind his wife to the arbitration agreement or waive her constitutional right to a jury trial. Defendant does not provide a copy of a durable power of attorney executed by decedent, nor does it provide any other evidence tending to show that James was authorized to waive his wife's right to a jury trial. The only evidence presented is that James signed on the line marked "legal representative" on the arbitration agreements. (Exhibits A and B to Petition.) However, this representation of legal authority is not sufficient to show that the decedent had conveyed power to James to act for her in legal matters. Without some other evidence that decedent actually authorized James to act as her legal agent in matters such as executing arbitration agreements, defendant has failed to meet its burden of showing the existence of a valid and enforceable arbitration agreement.

Defendant argues that one spouse has the authority to the other spouse with regard to arbitration of medical malpractice claims, and therefore James Paulsen's execution of the arbitration clause was binding on his wife. (*Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 853-854; *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 142.) However, the cases cited by defendant were decided in the context of CCP § 1295, which specifically provides for arbitration of disputes with regard to medical negligence claims. (Ruiz, supra, at 843.) Here, however, plaintiffs have not raised a medical negligence cause of action, and the gravamen of their complaint is elder abuse and violation of patient's rights. Therefore, *Ruiz* and *Buckner* are inapplicable to the case, and defendant has not shown that James Paulsen's execution of the arbitration agreements is sufficient to bind his wife to arbitrate the dispute.

Also, to the extent that defendant relies on the first arbitration agreement, which purports to bind decedent to arbitrate disputes relating to medical malpractice, this agreement is not relevant to the present case, which alleges claims for elder abuse, wrongful death, and violation of the Patient's Bill of Rights, not medical malpractice. (See Complaint.) The California Supreme Court has made it clear that there is a great difference between medical malpractice claims, which arise out of professional negligence, and elder abuse, which arises out of the complete denial of a patient's basic needs. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32.) Thus, the first arbitration agreement does not cover plaintiff's elder abuse claim, and cannot serve as a basis for compelling arbitration of that claim.

Nor does either agreement cover the Patient's Bill of Rights claim, since the Patient's Bill of Rights expressly forbids waiver of the right to sue under the statute. (Health & Safety Code § 1430(b).) "An agreement by a resident or patient of a skilled nursing facility or intermediate care facility to waive his or her rights to sue pursuant to this subdivision shall be void as contrary to public policy." (*Ibid*.) Also, the arbitration agreement itself specifically states that it does not cover claims under the Patient's Bill of Rights. (Exhibit A to Petition, fourth paragraph.) Therefore, defendant cannot rely on the first agreement to compel arbitration of the Patient's Bill of Rights claim. Nor would the second agreement be effective to compel arbitration of the Patient's Bill of Rights claim, since that claim is non-arbitrable under any circumstances.

Furthermore, the defendant has not shown that the plaintiffs executed the arbitration agreements in their own personal capacities with regard to the wrongful death claims. Since the wrongful death claims are brought by the individual plaintiffs on their own behalf, not as successors in interest to the estate of decedent, the plaintiffs must have executed the agreements in their personal capacities. (*Birl v. Heritage Care, LLC* (2009) 172 Cal.App.4th 1313, 1321.) However, there is no evidence that plaintiff Vince Oliver executed the arbitration agreements at all, and James Paulsen only executed the agreements in his alleged capacity as "legal representative" of decedent. (Exhibits A and B to Petition.) Therefore, plaintiffs' wrongful death claims are not covered by the arbitration agreements.

Defendant relies on *Ruiz v. Podolsky, supra*, 50 Cal.4th 838 for the proposition that non-signatory family members can be bound by an arbitration agreement signed by the patient with regard to their wrongful death claims. (*Id*. at 854.) However, as discussed above, *Ruiz* was decided in the context of CCP § 1295, which is a statute dealing with medical malpractice claims against health care providers. (*Id*. at 841.) Again, the present case is for elder abuse, violation of the Patient's Bill of Rights, and wrongful death, not medical malpractice. The arbitration clause was not executed under CCP § 1295, and MICRA would not apply here. Therefore, *Ruiz* is inapplicable to the present case, and the court declines to enforce the arbitration agreement with regard to the wrongful death claims.

Finally, even assuming that James Paulsen had the authority to execute the arbitration agreements on behalf of his wife, and thus the elder abuse claim is subject to arbitration, the court still intends to deny the petition to compel arbitration because the other two causes of action would have to be litigated separately, and this would create a risk of conflicting rulings of fact or law. (CCP § 1281.2(c).) CCP § 1281.2(c) states, in part, "A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." (CCP § 1281.2(c).)

Here, plaintiffs would be third parties for the purposes of the wrongful death claim, since they have brought that claim in the individual capacities rather than as successors in interest of the estate of decedent. (*Birl v. Heritage Care, supra*, 172 Cal.App.4th at 1322.) The two sets of claims also arise out of the same transaction, since they relate to the alleged neglect of decedent. There would also be a possibility of

conflicting rulings on common issue of law or fact, since the arbitration might result in different factual or legal findings regarding the issues of alleged abuse and neglect than the related court proceeding. (*Birl, supra*, at 1322.) Consequently, even if the court were to find that there was a valid arbitration agreement with regard to the elder abuse claim, the court would still exercise its discretion to deny the petition under CCP § 1281.2(c).

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1/15/13.
(Judge's initials) (Date)

Tentative Rulings for Department 503

03

Tentative Ruling

Re: ***Carroll v. Fresno University Medical Center***
Case No. 12CECG01624

Hearing Date: January 16th, 2013 (Dept. 503)

Motion: Defendant O'Shaughnessy's Demurrer and Motion to Strike Portions of First Amended Complaint

Tentative Ruling:

To sustain the demurrer to the first and second causes of action for failure to state facts sufficient to constitute a cause of action and uncertainty, with leave to amend. (Code Civ. Pro. § 430.10(e).) Plaintiff shall serve and file her second amended complaint within 10 days of the date of service of the court's order. All new allegations shall be in **boldface**.

To grant the motion to strike the references to premises liability and products liability from the complaint, without leave to amend. (Code Civ. Pro. §§ 435, 436.)

To grant the motion to strike the prayer for punitive damages from the complaint, for failure to comply with Code of Civil Procedure § 425.13. If plaintiff wishes to seek punitive damages, she must first file a motion for leave to add the damages to the complaint with the court under section 425.13.

To grant the motion to strike the prayer for $3.5 million in punitive and general damages, as improperly alleged under Code of Civil Procedure § 425.10(b). To deny leave to amend as to the prayer for a specific amount of money damages.

Explanation:

Demurrer to First Cause of Action: The plaintiff has failed to state facts sufficient to constitute a cause of action for intentional tort. It appears that plaintiff is attempting to state a claim for medical battery based on the allegation that defendant performed the implant procedure on her without her informed consent. (First Amended Complaint, Intentional Tort Attachment, p. 1 of 1.) Thus, to the extent that defendant argues that the complaint is uncertain because he cannot determine what cause of action is being alleged against him, the demurrer is not well taken. It is possible to glean the intended cause of action from the allegations of the complaint. Demurrers for uncertainty are disfavored by the courts, and courts will generally overrule such demurrers where any ambiguities can be cleared up in discovery or stipulations. (*Khoury v. Maly's of California, Inc*. (1993) 14 Cal.App.4th 612, 616.)

However, it is uncertain whether plaintiff is alleging that defendant performed a procedure that is different from the one she consented to, or whether she is alleging that she consented to the procedure actually performed by defendant, but not to the specific kind of implant used. Where a patient gives consent to one type of procedure and the doctor performs a completely different procedure, the patient can state a claim for the intentional tort of medical battery. (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 240-241.) On the other hand, where the patient consents to the procedure that was actually performed, but an undisclosed complication results, the patient can only state a claim for negligence because the doctor did not intentionally deviate from the consent given. (*Ibid*.)

Here, plaintiff alleges that defendant implanted the Xenform mesh device in her without discussing the product with her, and without obtaining her consent to implanting the Xenform device. (FAC, Intentional Tort Attachment, p. 1 of 1.) However, it is unclear whether plaintiff is alleging that she did not give informed consent to the procedure actually performed by defendant, and that defendant performed a completely different procedure from the one she consented to, or whether she is alleging that she did consent generally to an implantation procedure, but she did not consent to the specific type of device used. Thus, it is unclear whether the plaintiff is alleging an intentional tort, i.e. medical battery, or a breach of the standard of care based on failure to disclose all of the known risks of the procedure to which she consented, which is merely negligence. (*Cobbs, supra*, at 240-241.) As a result, the first cause of action is uncertain and fails to state a claim for intentional tort. The court therefore intends to sustain the demurrer to the first cause of action with leave to amend.

Demurrer to Second Cause of Action: Next, defendant demurs to the second cause of action for general negligence on the ground that it is uncertain because the cause of action mentions "Brenda Lowe" rather than plaintiff's actual name, Brenda Carroll. (FAC, General Negligence Attachment, p. 1 of 1.) However, the other allegations of the complaint make it clear that plaintiff is the person who underwent the procedure. The discrepancy with the plaintiff's name appears to be a typographical error, and any ambiguity can be resolved in discovery. Therefore, the complaint is not uncertain with regard to the name of the patient injured by the procedure.

Defendant also notes that plaintiff has not alleged that defendant O'Shaughnessy was the person who failed to inform plaintiff of the plan to implant the device in her, and that she actually alleges that another entity, the "Woman [*sic*] Health Clinic located within Fresno University Medical Center", failed to warn or inform her of their intent to perform the implant procedure. (FAC, General Negligence Attachment, p. 1 of 1.) However, the allegations of the complaint as a whole, including the previous cause of action for intentional tort, show that defendant O'Shaughnessy failed to discuss the product with plaintiff or obtain her consent to implant the device. (FAC, General Negligence Attachment, p. 1 of 1.) Therefore, plaintiff has sufficiently alleged that O'Shaughnessy negligently failed to obtain her informed consent to the procedure performed.

Next, defendant contends that plaintiff has not alleged that she never gave her informed consent to the procedure. Yet plaintiff has alleged in the intentional tort claim that she did not consent to the procedure, and that Dr. O'Shaughnessy never informed her that he was going to implant the device. (FAC, Intentional Tort Attachment, p. 1 of 1.) Plaintiff was also never informed of the complications associated with mesh implants, which are known to erode and cause suffering. (*Ibid*.) Thus, plaintiff has adequately alleged that she did not give informed consent for the procedure defendant performed.

However, plaintiff does not specifically allege that a reasonable patient would have not consented to the procedure if they had been informed of the known risks. (CACI 533.) Nor does she allege that Dr. O'Shaugnessy should have explained the risks of the procedure before it was performed. (*Ibid*.) Plaintiff's allegation of damages is also somewhat vague and uncertain, since she only alleges that she has been "unable to lead a normal life", and that the implant has "totally destroy[ed] [her] life." (FAC, Intentional Tort Attachment, p. 1 of 1, General Negligence Attachment, p. 1 of 1.) It is unclear what type of damages plaintiff is alleging from the procedure. Therefore, the court intends to sustain the demurrer to the second cause of action for uncertainty and failure to state a claim. However, the court intends to grant leave to amend since it appears that plaintiff can cure the defects in the complaint if given a chance to do so.

Motion to Strike: The plaintiff has not alleged any facts whatsoever to support the boxes checked on the complaint regarding products liability and premises liability. Nor does it appear that the facts alleged in the complaint would allow plaintiff to state a claim for products liability or premises liability as to any of the named defendants. Therefore, the court intends to strike the references to premises liability and products liability from the complaint, without leave to amend. (CCP §§ 435, 436.)

Nor has plaintiff filed a motion for leave to request punitive damages against defendant O'Shaughnessy, who is a health care provider. Code of Civil Procedure § 425.13 requires a plaintiff alleging a medical negligence claim against a health care provider to first file a motion with the court before requesting punitive damages. (Code Civ. Pro. § 425.13(a).) The court can only grant leave to amend the complaint to add a prayer for punitive damages if the plaintiff shows through affidavits that she has a substantial probability of prevailing on her claim for punitive damages. (*Ibid*.)

Here, plaintiff has not brought a motion for leave to add a prayer for punitive damages to the complaint, nor has the court granted plaintiff leave to add such a prayer to the complaint. Therefore, the court intends to strike the improper prayer for punitive damages. If plaintiff wishes to seek punitive damages, she must bring a motion to amend to add a prayer for such damages supported by affidavits, as required under CCP § 425.13.

Finally, the court intends to grant the motion to strike the prayer for damages of $3.5 million from the complaint. Under CCP § 425.10(b), "where an action is brought to recover actual or punitive damages for personal injury or wrongful death, the amount demanded shall not be stated" in the complaint. (Code Civ. Pro. § 425.10(b).) Thus,

plaintiff's demand for a specific amount of money damages is improper and the court intends to strike it from the complaint, without leave to amend.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 1/10/2013.
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Utility Trailer Sales of Central California, Inc. v. Roberts Managing Contractors, Inc.***
Case No. 09CECG04060

Hearing Date: January 16th, 2013 (Dept. 503)

Motion: Defendant/Cross-Defendant W. Reyneveld Construction's Motion for Good Faith Settlement and Request for Dismissal of Plaintiff's Complaint

Tentative Ruling:

To grant defendant/cross-defendant W. Reyneveld Construction's motion for determination of good faith settlement. (Code Civ. Proc. § 877, *et seq*.) To dismiss all claims and cross-claims against Reyneveld. (*Ibid*.)

Explanation:

Under CCP § 877.6, "Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section 1005." (CCP § 877.6(a)(1).)

"The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counter affidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing." (CCP § 877.6(b).)

"A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (CCP § 877.6(c).)

"The party asserting the lack of good faith shall have the burden of proof on that issue." (CCP § 877.6(d).)

Where the motion for good faith settlement is not contested, a barebones motion which sets forth the ground of good faith, accompanied by a declaration which sets forth a brief background of the case, is sufficient to meet the settling party's burden of showing good faith. (*City of Grand Terrace v. Superior Court (Boyter)* (1987) 192 Cal.App.3d 1251, 1261.)

"[T]he intent and policies underlying section 877.6 require that a number of factors be taken into account including a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants. [Citation.] Finally, practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement. '[A] defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be.' [Citation.] The party asserting the lack of good faith, who has the burden of proof on that issue (§ 877.6, subd. (d)), should be permitted to demonstrate, if he can, that the settlement is so far 'out of the ballpark' in relation to these factors as to be inconsistent with the equitable objectives of the statute. Such a demonstration would establish that the proposed settlement was not a 'settlement made in good faith' within the terms of section 877.6. 7." (*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500.)

Here, Reyneveld has filed a basic good faith settlement application under CCP § 877.6(b)(2), seeking approval of its $200,000 settlement with plaintiff. The settlement appears to meet all the requirements for a good faith settlement, and there is no opposition to the settlement from any other party. It is the burden of the party opposing the settlement to show that the settlement was not made in good faith. (CCP § 877.6(d).) Therefore, the court intends to approve the settlement and order all claims and cross-claims against Reyneveld be dismissed.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 1/11/2013.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Thao et al. v. Chevy Chase Bank et al.***
Superior Court Case No. 09CECG04134

Hearing Date: January 16, 2013 **(Dept. 503)**

Motion: By Defendants Tony Vang, Mai Xiong and Tvic Chang seeking leave to file a Cross-Complaint

Tentative Ruling:

To grant the Defendants' unopposed motion seeking leave to file a Cross-Complaint pursuant to CCP § 428.50. The proposed Cross-Complaint must be filed within five days of notice of the ruling. Notice runs from the date of service by the clerk of the minute order.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 1/15/2013.
(Judge's initials) (Date)